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# Use and Occupancy: Profits and Commissions: Rents and Leasehold Insurance

*AN ADDRESS*

DELIVERED BEFORE THE ONE HUNDRED AND FORTY-SECOND MEETING OF

## The Insurance Society of New York

ON

Tuesday, January 30, 1917

BY

Mr. Leo Levy

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# Use and Occupancy: Profits and Commissions: Rents and Leasehold Insurance.

In the present New York Standard Form of Policy, at lines 38 to 44, inclusive, are various words, phrases and clauses which seek to exclude certain items of fire loss from the coverage of the policy.

The first part expressly declares that the insurer shall not be liable for loss to accounts, currency, deeds, evidences of debt, etc., and the words are clear and unmistakable.

Immediately following and in the same paragraph is found language which in many respects seems confused and ambiguous, with misleading punctuation. It begins with the expression "nor unless liability is specifically assumed hereon for loss to awnings, etc., * * * property held on storage or for repairs or *by interruption of business, manufacturing processes or otherwise.*"

We are all familiar with the forms in daily use which take from the above excluding clause its operation upon items such as patterns, models, signs, store and office furniture and fixtures, property held on storage or for repairs, and the substitution of direct coverage and the trust and commission clauses.

The words, however, "nor unless liability is specifically assumed hereon for loss * * * by interruption of business, manufacturing processes or otherwise" cannot be dealt with so lightly.

I am unable to say what was intended by the word "otherwise" except that the phraseology indicated when read as above means that the insurer should only be liable for direct loss of cash value as distinguished from consequential or indirect loss, which, though invariably following a fire damage, is not secured

to the assured unless liability therefor has been specifically assumed elsewhere in the contract.

It has been believed that strictly it is neither permissible nor legal to insure against loss by interruption of business or manufacturing processes under Standard Form, but it would seem that the language employed does warrant the writing of such insurance coverage and make it valid, and this without regard to the question of estoppel should a policy have been issued wherein obligation is assumed for damage by "business interruption, manufacturing processes or otherwise."

It is assumed for the purposes of this paper that a bargain has been made and a form adopted which expressly covers the subject matters of the paper and thus there are called up for discussion some of the questions that have arisen and have been determined by adjudication and which may serve as help in avoiding disputes.

It may also be taken for granted that in the discussion of these various subjects most of them have to do with ambiguities due to diversity of form; and in practice it is to be noted that there exists at the present time no uniform or standard rider which under the section of the insurance law is authorized to be attached to the policy describes these interests, and it is to be borne in mind that the courts universally say that though there might appear hardship or injustice in particular cases, *"all ambiguity or doubt as to the meaning of terms of policies having no accepted significance, such ambiguity or doubt would be resolved against the insurer,"* and if it appear that what was intended to be covered was "interruption of business, manufacturing processes or otherwise," no matter what phraseology may have been employed, such intent once established, there would be secured to the policy-holder by court adjudication the loss suffered and not covered by the destruction of the physical property.

Before referring to the different classifications outlined, it may be in point to call attention to an extreme to which the courts have gone in aiding an assured in establishing *cash value.* This in the well-known case of Phillips v. Ins. Co., 128 App. Div., 528, where it was held that upon the ordinary and usual fire policy covering *merchandise* a loss occurred to straw hats which had been completely manufactured, sold, cased for shipment but not delivered, and the delivery of which was to have been begun the day after the fire and to have continued for a period of months thereafter, since it was impossible to



rebuild the plaintiff's factory in time for *seasonable reproduction* and the same were not purchasable in the open market, the Company was liable for the *cost* of manufacture *plus the profits* which had been included by the assured in the actual selling price and that the *cash value* as thus determined was not the cost (straw hats, it being held, were not an ordinary staple) but the *price at which the assured had agreed to sell.* There was a strong dissent in the case to the effect that as the selling price included profits such profits should not be recoverable under the policy insuring merchandise, as there was no insurance of profits *as such.*

The point which I am seeking to make is that the insurance now discussed is intended to secure to or indemnify the assured against loss of that which might roughly be termed profits as distinguished from the other kinds of insurance attempted to be covered in this paper.

Profits have been defined as "the expectation of pecuniary gain or advantage from the continued existence of the thing insured." In the old case of Insurance Company v. Coulter, 3 Peters (U. S.) 222, profits were said to be "a mere excrescence of the principal—the sums added upon the value of goods beyond the prime cost."

In the year *1830,* where the subject matter of insurance was profits of a certain voyage, it was held that it was not a matter of inquiry at the instance of the insurer to speculate as to whether or not profits might have been earned had the voyage (interrupted by the destruction of the vessel by fire) been continued to its projected conclusion. The question was to be disposed of upon reason and principle and that the loss of the cargo must necessarily carry with it the loss of profits, and that the rule thus adopted had convenience and certainty to recommend it, using the words:

> "Here was a voyage of many thousand miles to be performed, final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain; and in each case the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it would have been subjecting the rights of the plaintiff (the assured) to mere mockery."

This language used so long ago was reaffirmed by the same august tribunal in 1899 in the case of Sugar Refining Company v. Insurance Company, 175 U. S., at page 624. In that case the policy read to a fixed amount of profits on a cargo of sugar and it was decided in addition that even though a part of the cargo was salvaged there had been a total loss within the fair intendment of the contract.

Necessarily there is involved in the discussion of profits the question of insurable interest, and in that connection it might be instructive to dwell upon what has been held to be insurable where the ownership is not in the insured, and this is referred to as pointing the distinction to be borne in mind, to wit: that though the provisions of the Standard Form would void the insurance if the assured were not sole and unconditional owner, etc., it would seem that insurance upon the intangible property rights under discussion are unaffected by lack of legal title, provided only that there existed in the assured a sufficient insurable interest.

As far back as Riggs v. Commercial Ins. Co. (125 N. Y. 8) it was held that a stockholder of a corporation holding no title to the corporate property except by such indirect ownership could legally insure such interest; and that the insurable interest was really to be determined by the rule that

> "if a person be so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager, whether such interest was an ownership in or a right to the possession of the property or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject" .

but further noting

> "that the mere hope or expectation which may be frustrated by the happening of some event is not insurable."

In the given case the stockholder's right to dividend or final disposition of the corporate property possibly prejudiced by the casualty insured against was a sufficient showing of insurable interest which supported the right of recovery of the indemnity.

See also Cone v. Niagara Ins. Co., 60 N. Y. 619; Wilson v. Jones, Law Reports, 2 Exch. 139; Herkimer v. Rice, 27 N. Y. 163; Rohrback v. Ins. Co., 62 N. Y. 47; Oil Co. v. Ins. Co., 106 N. Y. 535.



With respect to the headings of the paper:

(A) Use and occupancy,

(B) Profits and commissions,

(C) Rents and leasehold,

it may be said generally that in principle there exists no difference in coverage and for the purposes of this paper the definitions here given may be taken as explanatory.

"Use and occupancy" has been judicially defined "as being the business use of which the described property is capable." Tannenbanm v. Simon, 40 Misc. 175, 84 App. Div. 642. Also, "as applying to the status of property and its continued availability to the owner for any purpose he may be able to devote it to" (Michael v. Prussian National Ins. Co., 171 N. Y. 25) as seen in the instance of a grain elevator or a hotel, the business availability of which might be impaired or destroyed by fire loss to the structure. See Chatfield v. Ins. Co. (71 App. Div. 164).

Profits have been defined as stated "as the expectation of pecuniary gain or advantage from the continued existence of the thing insured."

Rents as such are sums derivable from real property interests and to the assured lost by fire because of the interruption of the continued enjoyment of the property; and as to the tenant under lease, the destruction or impairment of the same property right for which the lessee has paid or is obligated to pay.

## *A*

## USE AND OCCUPANCY.

Use and occupancy upon this accepted definition is wide in its coverage.

The business use of which described property is capable would ordinarily mean that purpose to which the assured might, could or would devote the property to produce income which, if prevented by a casualty insured against, to wit: fire, would immediately and justly give rise to a claim for loss; the question seriously to be considered would be the measuring of the liability to the insured. What in a given case might be held to be a valued policy, in another would leave open and subject to proof the question of damage.

There have been examined for the purposes of this paper a great many forms of use and occupancy coverage; some pre-

pared by insurer, by broker and others by apparent co-operation between the two.

Many times there have been added to the form reading use and occupancy the words "including fixed charges." Necessarily the implication would follow that there was intended to be covered those items of expense which would have to be met by the assured even though the property itself were damaged or destroyed, as, for example, interest on mortgages, salaries to employees under contract, and many others which, as accounting propositions, would have to be added to the loss defined as the impairment of the business use of which the described property is capable; there is, as stated, *no uniform rider and each case must be taken on its own facts.*

A reading of the adjudicated cases leads to the conclusion that "use and occupancy" is a much broader cover than "Profits, Rents or Leasehold."

In the well-known case of Michael v. National Ins. Co., 171 N. Y. 725, known as the grain elevator case, the "use and occupancy" of a grain elevator against a fire loss which "would prevent the elevating and other handling of grain" was involved. The oft laid down ruling that any of the general conditions of the Standard Form which were found to be repugnant to or inconsistent with statements otherwise in the contract, those which were most favorable to the assured would be held to be controlling, and that the expectation of profits and earnings derivable from property not alone were conveyed by the words "use and occupancy," but that the definition first above quoted as to use and occupancy was the one which would govern the Court in defining the obligations of the insurer, and that had it been the intent of the insurer to limit its coverage to earnings and profits alone, appropriate and unmistakable words therefor would have been used and not the words "use and occupancy."

It was the insurer's contention in that case that the coverage "use and occupancy" meant such earnings and profits which *would have been* derived by the assured from the *actual* operation of the elevator, and since it was shown as a fact that by virtue of arrangements or agreements made by the owners of the elevator this particular property was not in operation, there did not result to the assured any loss which was recoverable. Such contention was held to be ill-founded.

Again, in the two cases of Tannenbaum v. Simon, 40 Misc. 174, and Same v. Freundlich, 39 Misc. 819, under the well-known



form of broker's contract where the assured had agreed to carry insurance including that upon *"use and occupancy" building and rents,* the brokers plaintiff claimed damages for the assured's failure to carry the kind of insurance specified, and sought to establish that the measure of damage under use and occupancy insurance was the profit which the defendant insured had made upon the premises and shown by computations covering a period of years. The Court held that such profits were not in any wise valid elements usable in ascertaining the amount of insurance which the broker's customers had agreed to carry, and that "use and occupancy" was not and could not be profits or estimated profits from earnings, however ascertained, and that the record of the business for prior years had no direct bearing upon the establishing of the value of use and occupancy and could not legally measure the damage.

In the absence of express language clearly indicating the contrary, the writer is inclined to the belief that a policy upon "use and occupancy" as such would be held to be valued, and that if it be sought in practice to avoid such a construction, there should be clear expression by simple and unambiguous language of exactly what measure of damage is to be applied and that the intent to leave the ascertainment of damage as under an open policy should be made unmistakably clear.

## *B*

## PROFITS AND COMMISSIONS.

As indicated, profits and commissions attempted to be secured to the insured under contracts in question are those having to do with the future and which are lost to the assured by reason of the casualty.

The Court decision above referred to as to "what human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous that to have required testimony would have been subjecting the rights of the assured to mere mockery" is indicative of the difficulty of laying down a measure of damage which would limit the right of recovery on a profits or commission contract, and in seeking to define liability of the insurer under contracts covering profits and commissions, it has already been pointed out what profits are and what it is the Courts might say would be secured to the insured under a policy which read on profits, and it is to be noted that

there is very little, if any, distinction between the words "profits and commissions."

In the case of LITE v. INS. CO. (119 App. Div., 410, affirmed 193 N. Y., 639, without opinion) the lessee was insured against loss of profits that inured to him under lease of a certain building. The fire rendered untenantable a substantial number of the apartments in the building. The owner, under the terms of the lease, was obligated to and did grant to the assured lessee a diminution of rents, and it was held that the policy, which read, as stated, with various provisions as to how the loss should be computed, did not for all purposes make the policy a valued one, but it was valued only in the event of a total loss and that it was proper to show any loss which resulted to the assured, although not ascertainable by the monthly limit fixed in the contract; and, though it would be difficult to fix the amount of *partial loss*, the assured had shown enough to have justified *a jury* in saying that there had been a loss sustained, and since there might be reasonable precision in the ascertainment of such *partial loss, it was for the jury to be precise and reasonable.* There was strong dissenting opinion that there having been actual diminution of rent allowed by the landlord there was no actual loss in fact suffered by the insured and there should be no award of damage.

In the case of OIL COMPANY v. INS. CO. (106 N. Y., 538) the policy by its terms insured royalties under a patent licensing agreement to be earned in an oil reducing and filtering works. There again came up the question of the measure of damage, and it was contended by the insurer that since the fire did not cause a *reduction in output* and hence a lessening of royalties, there had been no loss that was recoverable. The Court held to the contrary, saying that the earning power under the royalty contract was affected by the fire which destroyed the refinery and that the injury to the assured was to his right to receive royalties and came from the enforced idleness of part of the refinery and that the assured upon proving what the oil works *could have* earned and which the fire prevented it from earning, was sufficient proof of damage.

On the question of commissions, the case of HAYES v. INS. CO., 170 Mass., 492, is instructive. Plaintiff was an agent of an insurance company and was entitled to receive under his contract as compensation the sum equal to twenty per cent. of the premiums on policies issued by him and an extra compensation of ten per cent. on the *net profits on all of the business* of the company. It was decided that the agent had an insurable interest in the property insured by the Company sufficient to support a policy issued to him which covered his compensation as specified in the agency contract, the Court saying that the property belonging to others and which was to them insured under the policies of the Company employer, even though not owned by the employee agent, would, if destroyed, deprive the agent of his extra compensation by depriving the Company employer of profits on the business, and since this would bring to the agent a direct pecuniary loss of the profits of the insurance company which he was to receive, there was established an insurable interest recoverable under the particular contract of indemnity there before the Court.



## *C*

## RENTS AND LEASEHOLD:

The interests thus affected are described for the purpose of illustration in CASEY v. INS. CO. (33 Hun., 315). The policy covered a lease of a building. The lessee had sub-let the same, by which there was netted to him a yearly profit.

The fire partially destroyed the premises so that they were in fact untenantable. The assured claimed the loss of several months' rent, to wit: the sum of rent *receivable* in excess of the rent to be *paid.* It was held that this was the right measure of damage on this form and that that was the security or indemnity which the lessee insured and had contracted to have made good to him. This is almost a parallel to profits insurance, although classified as rent insurance. At the same time ordinary rent insurance would be the income derivable from property as rents which are lost to an owner or lessee by reason of the partial or total destruction of described property.

In the case of HELLAR v. INS. CO., 177 Pa. State, 202, the insurance was *against loss by reason of having to pay rent for a building under lease while untenantable through fire loss.* On the same building the owner had insurance against loss of rent and the contest arose between the two different sets of insurers. Without discussing certain peculiarities of fact and of law there arising, it was shown that after the fire the landlord and tenant had agreed upon the tearing down of the building and the placing upon the premises of a new structure which in part cov-

ered the area of the old and in addition a much larger area at a largely increased rental. The lessee's insurer contended that the landlord owner had been paid the loss by his insurers and that the tenant having agreed with the landlord for a new building, the measure of liability was the period of time elapsing between the fire and the day when the landlord entered upon the insured premises for the purpose of erection of the new building. It was decided that the tenant's insurer had nothing whatever to do with the landlord's insurer and that there was nothing in the new arrangement between the landlord and the tenant which in anywise could be said to diminish the liability of the tenant's insurer and that the measure of the damage so far as the obligation to the tenant was concerned was the interval of time which, when proven, could be reasonably said to be necessary for the replacement of the original building, and since such period necessarily exceeded the time limited in the contract, the Company insuring the tenant was liable for a total loss and that any new arrangement between the landlord and tenant did not affect or control the fixing of the amount.

In conclusion, attention is directed to the historic case of NIBLO v. INSURANCE COMPANY. The policy read to the assured on Niblo's Garden; on the proposition of the measure of damage the following copious note from the decision is taken:

> "The vital question in the cause is, What was that loss? The plaintiff claims first, that having a legal insurable interest in the buildings as lessee, he is entitled to recover their value as fixed by the policy. The case of Laurent v. The Chatham Fire Insurance Company (1 Hall's R., 41) in this court, which was cited by the plaintiff, does not sustain his position. There the assured owned the building, entire. The landlord had no interest whatever in the property insured. In this case, the buildings were the exclusive property of *Van Rennselaer's devisees,* and the interest of the assured *was merely his right* to possess and occupy them for the unexpired portion of the year for which they were demised.
>
> "In fire insurance generally, there is nothing corresponding with the valued policies used in marine insurance, and the assured recover according to their actual loss, as established in evidence. (2 Phill. on Ins., 40, 53). We perceive no reason for distinguishing this case from the general rule. On the contrary, it would be extravagant and dangerous to hold that the lessee of a house for a year can recover its entire value on a destruction by fire, upon a policy insuring it for its value. How it would be, if the insurer were fully apprised of the extent of his interest when they issued the policy, we are not called upon to decide.
>
> "Next, it is claimed by the plaintiff that if the extent of his interest be open to inquiry for the purpose of reducing its value, it is proper to look into the circumstances which increase the value of the property to him. And in this view he offered the testimony which was excluded at the trial. It is said that the evidence was not to show *remote, uncertain or contingent profits,* but to prove bargains actually made, and which were certain to produce gains to the extent of the insurance by the use of the tenements to the end of the term, if the buildings endured to that time.
>
> "The point urged is plausible; but it is not to be disguised that it leads to the admission of proof of gains and profits interrupted and cut off in every case where the tenement insured is occupied for business purposes, and the injury to the building itself or to the interest of the assured therein is less than the sum insured.
>
> "We have no hesitation in saying that on an insurance against loss or damage by fire *on a building, simply,* and its injury or destruction by the peril insured against, the assured cannot recover for his loss, occasioned by the interruption or destruction of his business carried on in such building, nor for any gains or profits which were morally certain to enure to him if it had remained uninjured to the expiration of his policy.
>
> "It is undoubtedly true that profits may be insured; but they must be insured *as such;* so that the underwriters may know with what subject they are dealing. (See 1 Phill. on Ins., 122, 191.) This policy is upon certain buildings. It agrees to make good to the assured such loss or damage as shall happen by fire *to the property specified;* not the damage which shall happen to the plaintiff by reason of the interruption of his business, nor to the gains which he would make in those buildings if they remained unharmed. The policy prescribes that the loss shall be estimated according to the true and actual cash value of *the property insured,* at the time of the fire; (limited of course by the extent of the interest of the assured;) and in the proof of loss, the assured is to make oath of the cash value of the subject insured. Thus, besides its silence as to everything aside from the buildings as such, the policy is inconsistent with the supposition that anything else is insured. And finally, the tenth condition annexed, giving to the insurers the option to repair or rebuild, cannot be reconciled with the plaintiff's claim for damages growing out of the interrupted use and enjoyment of the premises.

"Our conclusions from the good sense of the contract are sustained by a decision of the King's Bench, in England, and by the opinion of this Court pronounced in the first year of its existence.

"In Wright v. Sun Fire Office (3 Nev. & Mann, 819; S. C. 1 Ad. & Ell. 621), the policy insured £1000 'on his interest only in the Ship Inn and offices.' The premises being injured by fire, the insurer reinstated them pursuant to the policy. The assured then claimed to recover for the rent paid in the meantime, the hire of other houses, &c., while the inn was being repaired, and the loss or damage sustained by him by reason of various persons declining to go to the Ship Inn while it was undergoing such repairs. The cause was submitted to an arbitrator under a rule of court, who awarded to the assured £450 for the loss he had sustained in his business as an innkeeper by not being able to occupy the inn and offices during the interval between the fire and the rebuilding of the premises. On a rule nisi to set aside the award, it was contended by the assured that the interest which he had in the inn consisted in the power to use it in his business as an innkeeper, and the loss by temporary inability to use the inn was within the meaning of the policy; and the loss of business by reason of his not being able to use the premises would be equally within the policy. That the profits from the use of the inn were an insurable interest, and the nature of the interest of the insured in the subject-matter may be left at large, if the subject be properly described.

"The Court held that the policy did not cover the profits of the business, or the loss sustained in his business, by the assured being unable to occupy the premises; and that profits, when insurable, must be insured as profits, and are not recoverable as an incidental loss under the insurance of a building.

"The argument of Chief Justice Jones, in the case of Laurent is elaborate and satisfactory to show that as it is the tenement upon which the insurance is made; so the actual value of the tenement, as a building, is the loss of the assured, on its destruction by fire; that however unproductive the property may be, or however great may be the extent of the revenue derived from it, the measure of indemnity in case of loss is simply its value as a building.

"The plaintiff, in conclusion, insisted on a return of the premiums paid from the outset, if it were held that he had no insurable interest in the buildings. As to this, we have already declared our opinion that he had an insurable interest as tenant; and that being so, there can be no return of premium.



"There is nothing before us by which we can adjust the extent of his interest covered by the policy; and there must be a new trial to ascertain the same, unless the parties will agree upon some amount to be taken as the verdict of a jury, assessing his damages for such value. On the principle we have established, there can be no allowance for the loss of his business or interrupted gains; but merely for the value of the tenements for occupation, subject to the rent. One mode of putting the inquiry to the jury would be this: How much would a stranger, having no contracts or engagements pending, such as the plaintiffs offered to prove, have given for the unexpired lease when the fire occurred? *There may be other modes of stating the inquiry, equally proper, but we will not attempt to anticipate them.* We recommend the parties to agree, in order to save the expense of another trial."

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